No. 96-1515

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

THOR CHRISTENSEN and
JOSEPH WOODROW PANKEY, JR.,

Petitioners,

v.

MICHAEL D. GRIFFES, COMMISSIONER
OF MOTOR VEHICLES,

Respondent.

Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Vermont

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

RESTATEMENT OF THE CASE

In June, 1994, just five months after this Court denied certiorari in *Barringer II*,[1] the Vermont General Assembly amended the tax laws and effectively repealed the motor vehicle purchase and use tax on vehicles acquired and taxed in other states. Opp. App. 1-2. The owners of these vehicles may now obtain Vermont registrations and drive on Vermont's roads without paying the five percent tax paid by other motorists.

As part of the same legislation the General Assembly enacted a massive tax refund program. The motor vehicles commissioner was authorized to grant tax refunds to everyone who had paid the Vermont purchase and use tax between 1980 and 1994 after first paying a similar tax to another state. P.A. No. 223, §3 (1994 Vt., Adj. Sess.) Pet. App. 29a-31a.

The legislation went on to require the commissioner to assist taxpayers with the refund process, to consider "any relevant evidence" of taxes paid to other states and to honor all refund claims made through December 31, 1995. He was instructed to disregard the one-year statute of limitations that applied to taxpayer lawsuits for refunds. And, consistent with the existing refund statute, he was instructed to pay refunds without also calculating and paying interest. *Id.*

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[1] *Barringer v. Griffes (Barringer II)*, 1 F.3d 1331 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 879 (1994).

This remedy – the refund of all taxes collected over a span of fourteen years, subject only to minimal documentation and without interest – was generous, practical and efficient. It was "a clear and certain remedy" which provided "meaningful backward-looking relief" to a very large universe of taxpayers, including the petitioners. It complied with *Barringer II* and afforded taxpayers all of their rights under the Due Process and Just Compensation Clauses of the Constitution.

1. The Motor Vehicle Purchase and Use Tax.

Vermont imposes a five percent tax on vehicles that are registered for use on the State's roads. *See* Vt. Stat. Ann. tit. 32, §§8903(a) and (b) and 8905(a) and (b). The tax is assessed as a sales tax in the case of vehicles purchased in Vermont and as a use tax in the case of vehicles purchased elsewhere. *Id.* The purpose of the tax is to "improve and maintain the state and interstate highway systems." *Id.*, §8912.

The statutes now provide a tax exemption (in the form of a credit) for vehicles purchased in other states if the owner has paid a purchase or use tax to the other state. *See* Vt. Stat. Ann. tit. 32, §8911(9) (Supp.1996). Persons who have paid an equal or greater tax elsewhere may register their vehicles in Vermont and use Vermont's roads without paying any use tax to Vermont.

Prior to amendment in 1994 this credit for out-of-state taxes was quite limited. It applied only if the vehicle being registered in Vermont had never been registered in the other state, and only if the other state allowed a

reciprocal credit "for Vermont tax[es] paid in similar circumstances." Vt. Stat. Ann. tit. 32, §8911(9) (1991). As a general practice prior to 1986, and as a matter of regulation thereafter until 1994, the tax credit was rarely available and the use tax imposed identical burdens on longtime residents and new residents alike. *See Williams v. State (Williams II)*, 156 Vt. 42, 46 n.3 (1990), 589 A.2d 840, 843, n.3, *cert. denied*, 502 U.S. 821 (1991).

2. Prior Litigation

Petitioners and others have pursued various remedies using a variety of legal theories to avoid paying the purchase and use tax and to obtain tax refunds. They were ultimately successful. In the process, however, the courts consistently acknowledged the fundamental fairness of a tax formula that spread the tax burden to all persons – petitioners included – who registered cars in Vermont and used Vermont's roads.

In 1984, for example, the Vermont Supreme Court concluded that the tax was valid because it served the policy that "those who use the state's highways must contribute toward their maintenance" and because it did not discriminate against interstate commerce. *See Leverson v. Conway*, 144 Vt. 523, 532-36, 481 A.2d 1029, 1034-1036 (1984); *see also Williams v. Vermont*, 144 Vt. 649, 478 A.2d 993 (1984) (same). On appeal this Court reversed, on Equal Protection grounds, but remanded with the observation that if a full record were developed it might "turn out that in practice the statute does not operate in a discriminatory fashion." *Williams v. Vermont (Williams I)*, 472 U.S. 14, 28 (1985). The Court "put to one side the

question whether a State must in all circumstances credit sales or use taxes paid to another State against its own use tax." *Id.*

More recently, the U.S. District Court concluded after a full hearing that Vermont taxed "only the local use of automobiles" and applied "the same formula for calculating the tax . . . whether the car is purchased here or elsewhere." *Barringer v. Griffes*, 801 F. Supp. 1282 at 1286 (Vt. 1992). The Court rejected the argument that the tax discriminated against interstate commerce or otherwise violated the Commerce Clause.

On appeal, in a dissenting opinion, Circuit Judge Van Graafeiland reached the same conclusion as the District Court. He observed that "[i]n order for Vermont to make fair charges for the use of its highways it had to adopt some means of measuring use that was practical in operation and possessed at least a modicum of accuracy." *Barringer II, supra*, 1 F.3d at 1340 (1994). He reasoned that a tax like Vermont's, based on a car's value, should withstand constitutional scrutiny because it "bears at least a rough relationship to the benefits the car's owner will receive." *Id.* (citing *Williams I, supra*, 472 U.S. at 25 n.9) ("[d]espite the looseness of the fit, we would be hard pressed to say that this means of funding highway maintenance and construction is irrational.").

The two-judge majority on the Court of Appeals disagreed, ruling that the tax was unconstitutional as applied to persons who have paid taxes to other states. However, the majority refused to hold that a tax credit was "affirmatively required" in these cases, saying that such a holding would give the case "a broader reach than

necessary to decide this appeal." *Id.* at 1337. They decided instead that "[w]hat is to be done now is a matter confided to the Vermont legislature." *Id.*

3. Public Act No. 223.

The General Assembly responded to the Court of Appeals ruling by abandoning the principle that all who use Vermont's roads should pay a purchase and use tax to maintain them. The credit for out-of-state taxes was expanded so that the Vermont tax no longer applies to "motor vehicles on which a state sales or use tax has been paid by the person applying for a registration in Vermont . . . " P.A. No. 223, *supra,* at §1 (1994 Vt., Adj. Sess.) Opp. App. 1. Only "[i]f the tax paid in another state is less than the Vermont tax" is the use tax payable in Vermont, in which case "the tax due shall be the difference . . . " *Id.*

Act No. 223 also established a program for paying tax refunds. The motor vehicles commissioner was directed to refund taxes collected from all taxpayers who had paid similar taxes to other states. *Id.*, §3 Pet. App. 29a-30a. If the taxpayer was unable to document the taxes that were paid, the commissioner was required to "research the tax rates in effect in other states at all times relevant", "provide relevant information in the possession of the department of motor vehicles" and "compute the refund due when in receipt of a certified application." *Id.* The sum of $500,000 was appropriated to cover the administrative costs of processing refunds. *Id.*, §5.

In the same Act the General Assembly considered whether the commissioner should calculate and pay some rate of interest on refunds and whether he should assert the statute of limitations that applies to civil actions to recover taxes. It answered both questions in the negative. The Act authorized refunds of taxes collected since 1980 "[notwithstanding] the provisions of 12 V.S.A. §517" (the one-year statute of limitations in tax cases), and it authorized refunds "without interest". *Id.*, §3.

4. The Petitioners' Claims.

The petitioners moved to Vermont in 1984 and 1985 and sometime thereafter registered vehicles that they had brought with them. They had paid sales taxes to Indiana and to Louisiana when they purchased the vehicles in those states, and they paid a use tax when they registered the vehicles in Vermont. Pet. App. 11a-12a. Contrary to the assertions in their petition, they did not pay "a second sales tax" (or any sales tax) to Vermont. They paid a single use tax. *Id.*

Petitioners first sued for tax refunds in 1986, in the Vermont Superior Court. The Superior Court dismissed on the merits, petitioners appealed, and the Vermont Supreme Court dismissed for lack of subject matter jurisdiction. Pet. App. 28a. The appeal was dismissed by stipulation after the parties agreed that motor vehicles tax refund claims should be decided in administrative proceedings before the commissioner, and not in the superior courts. *See Williams II, supra,* 156 Vt. at 56.

Petitioners took no further action until September, 1993, after the Court of Appeals had announced its decision in *Barringer II*. At this point they filed refund claims with the commissioner, citing the Court's decision. The commissioner had already requested a rehearing in the Court of Appeals and so deferred action on their claims.

During the next several months the Court of Appeals denied the Commissioner's request for rehearing in *Barringer II*, the Supreme Court denied certiorari and the petitioners filed a civil action for tax refunds and for interest on the refunds. The commissioner answered the complaint and asserted various defenses including the statute of limitations. However, when the Legislature authorized refunds in all cases without regard to the limitations period the commissioner refunded petitioners' taxes.

Petitioners accepted refunds but continued to press their Superior Court action in an effort to recover interest on the amounts refunded. Their case was consolidated with another action that their attorney had filed *pro se* and on behalf of another client. The parties agreed that all of these cases could be decided on motions and cross-motions for summary judgment. Opp. App. 3 (Norman C. Williams letter to superior court). The trial court denied petitioners' claims for interest and entered judgment in favor of the defendant. The Vermont Supreme Court affirmed.

REASONS FOR DENYING CERTIORARI

Certiorari should be denied because the lower courts and this Court have consistently held that the States retain flexibility to fashion case-specific remedies when a tax is found to be unconstitutional. Petitioners have cited no decision which holds that discriminatory taxes must be refunded with interest in order to satisfy Due Process. Nor have they cited any decision which holds that tax payments to the government are takings covered by the Just Compensation Clause.

The remedial legislation enacted by the Vermont General Assembly in the wake of *Barringer II* authorized the refund of motor vehicle taxes paid over a span of fourteen years. It even included an appropriation of funds earmarked to provide assistance to taxpayers unable to complete their own refund applications. This law gave petitioners and others like them a full refund of the taxes they had paid. It afforded them a "clear and certain remedy" and the "meaningful backward-looking relief" required by the Constitution. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18, 31 (1990).

I. THE DECISION OF THE VERMONT SUPREME COURT IS CONSISTENT WITH THE DECISIONS OF OTHER STATE COURTS AND WITH FEDERAL PRECEDENTS.

The Supreme courts of three states (including Vermont) have considered the precise question presented by this case: whether Due Process requires the payment of interest on tax refunds when a state chooses refunds as

the form of relief it will provide to cure an unconstitutional discrimination. All three courts decided that interest payments are not required in these circumstances. *See Pendell v. Dept. of Revenue,* 847 P.2d 846 (Or. 1993) (power to tax distinguished from power of eminent domain); *Chicago Freight Car Leasing Co. v. Limbach,* 584 N.E.2d 690 (Ohio 1992) (failure to pay interest not a denial of due process); and *In re Petition of Williams,* 686 A.2d 964, ___ Vt. ___ (1996). The courts are not divided on this issue.

The several state court decisions cited by petitioners are distinguishable from the present case for two reasons. First, all of those cases were decided in the absence of a statute which indicated whether or not interest should be paid. *See* M.L. Cross, Annotation, *Right to Interest on Tax Refund or Credit in Absence of Specific Controlling Statute,* 88 A.L.R. 2d 825 (1963 & Supp. 1996). The Vermont Supreme Court was guided by Public Act No. 223 – a specific controlling statute.

The cases are also distinguishable because they did not arise in a context where the state was "free to choose which form of relief it will provide." *McKesson, supra,* 496 U.S. at 51. The taxing authority was not free to resolve claims, for example, by retroactively increasing the assessments on other taxpayers. *See,* e.g., *County of Ada v. Red Steer Drive-Ins,* 609 P.2d 161 (Idaho 1980). As a matter of state law or policy the choice of remedies was limited to tax refunds.

The present circumstances are different. According to *McKesson,* "a State found to have imposed an impermissible discriminatory tax retains flexibility in responding to this determination." *Id.* at 39-40. The choice of remedies

ranges "from a refund of the excess taxes . . . to an offsetting charge to previously favored [taxpayers]." *Id.* at 51. Moreover, "within our due process jurisprudence, state interests traditionally have played, and may play, some role in shaping the contours of the relief that the State must provide . . . " *Id.* at 50.

This balancing of state interests and taxpayer interests and this deference to a state's choice of remedies was evident throughout the course of the litigation over Vermont's purchase and use tax. In *Williams I* this Court "express[ed] no opinion as to the appropriate remedy." 472 U.S. at 28. In *Barringer II* the Court of Appeals decided that "[W]hat is to be done now is a matter confided to the Vermont legislature." 1 F.3d at 1337.

The Vermont legislature selected an appropriate remedy and its choice was sustained by the Vermont Supreme Court. There is no inconsistency between the decision of the Vermont Supreme Court and the rulings of other courts that have addressed the issue in similar circumstances.

II. NEITHER *MCKESSON* NOR *WEBB'S FABULOUS PHARMACIES* SUGGEST THAT THERE WAS ANY ERROR IN THE VERMONT SUPREME COURT DECISION.

McKesson did not hold that discriminatory taxes must be refunded with interest. Indeed, the range of options endorsed by *McKesson* included "refunds on a reasonable installment basis" without any reference to paying interest. *Id.* at 45. The tax refunds authorized by the Vermont legislature and approved by the Vermont Supreme Court

– full refunds of all taxes actually paid by the petitioners – provided the "clear and certain" remedy required by *McKesson*.

Petitioner's reliance on *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), is also misplaced. *Webb's* was not a tax case. It was a dispute about interest that had accrued on an interpleader fund that was held in escrow by a state court. The Supreme Court decided that since the fund was "private property" held for the purpose of making a distribution among private creditors, the Takings Clause protected both principal and interest. *Id.* at 160-161. The Court's holding was grounded in the "narrow circumstances of this case." *Id.* at 164.

Nor is any error suggested by the earlier cases cited by petitioners. *See* Petition at 11, citing *Educational Films Corp. v. Ward*, 282 U.S. 379 (1931) and *Hopkins v. Southern California Tel.*, 275 U.S. 393 (1928). These decisions were discredited by the Court's opinion in *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981).

> [Their] treatment of a no-interest refund remedy was undercut by later cases. Without expressly addressing the issue, the Court in two cases decided the same day, *Matthew v. Rodgers*, 284 U.S. 521, 528 (1932) (Mississippi refund remedy); *Stratton v. St. Louis Southwestern R. Co.*, 284 U.S. 530, 534 (1932) (Illinois refund remedy), found adequate two state refund remedies that apparently did not pay interest, *Gulf, M. & O. R. Co. v. Webster County*, 194 Miss. 660, 662, 13 So.2d 644, 645 (1943); *Lakefront Realty Corp. v. Lorenz*, 19 Ill. 2d 415, 422-423, 167 N.E. 2d 236,

240-241 (1960). Therefore, prior federal equity practice is a two-sided sword.

450 U.S. at 524 n. 31.

III. VERMONT HAS ACTED PROMPTLY TO COMPLY WITH THE LAW AS IT HAS EVOLVED DURING THE COURSE OF THIS LITIGATION.

Petitioners have attempted to portray Vermont and its officials as scofflaws. They argue that certiorari should be granted to teach "States and State officials to respect constitutional requirements." Petition at 23. The flaw in the argument is that the constitutional principle announced in *Barringer II* was previously unknown. Less than a year prior to that Court of Appeals decision the Chief Judge of the United States District Court for the District of Vermont had decided that there was no constitutional violation.

Moreover, Vermont's response to *Barringer II* was not at all analogous to the Florida circumstances discussed in *McKesson* and invoked by petitioners. The Florida statute at issue in *McKesson* "reflected only cosmetic changes from the prior version of the tax scheme that itself was virtually identical to the Hawaii scheme invalidated in *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984)." *McKesson,* 496 U.S. at 46. The Vermont statute at issue here effectively repealed the tax on vehicles like those owned by petitioners and gave them tax refunds.

The legal backdrop prior to *Barringer II* afforded little guidance to Vermont policymakers attempting to fashion a tax that was both easy to administer and that applied to all registered vehicles. As Judge Parker observed, "[i]t is

probably an understatement to say that the Court's dormant Commerce Clause jurisprudence, particularly as it relates to limits on state taxation powers, is unpredictable." *Barringer v. Griffes*, 801 F. Supp. at 1286. This Court has acknowledged that the law in this area "is something of a 'quagmire' ". *Quill Corp. v. North Dakota*, 504 U.S. 298, 315 (1992).

Barringer II itself produced conflicting opinions, and the two-judge majority began its discussion by remarking on the "changing winds" of Commerce Clause doctrine. *Barringer II, supra*, 1 F.3d at 1332. Continuing this nautical allusion they resolved "to hug the shore closely", declined to "rechart our course" to fashion a specific remedy and in the end said that "what is to be done . . . is a matter confided to the Vermont legislature." *Id.* This was hardly an outcome consistent with the Petitioners' characterization of Vermont officials and the litigation generally.

Petitioners are also wrong to imply that Vermont evaded this Court's decision in *Williams I*. Consistent with *Williams* the state promulgated a regulation to assure that the purchase and use tax applied to new and old Vermonters alike. *See Williams II, supra*, 156 Vt. at 46 n.3. Consistent with *Williams I, Mathews v. Eldridge*, 424 U.S. 319 (1976), and *McKesson*, the Vermont Supreme Court decided that the commissioner of motor vehicles had the statutory authority and a constitutional obligation to afford taxpayers a due process hearing to challenge any erroneous or unlawful tax collection. *See*

Williams II, 156 Vt. at 52-56.[2] Petitioners' attorney requested and obtained exactly such a hearing. Opp. App. 4-5 (excerpts from Hearing Officer's Findings of Fact, Conclusions of Law and Order).

In this same vein petitioners claim that the Vermont courts committed procedural errors in the present case by ignoring the rules that govern motions for judgments on the pleadings and motions to dismiss. Petition at 19 n.9 and 22 n.12. In fact the case was submitted to the trial court on cross-motions for summary judgment, a procedure that petitioners agreed to. *See* Opp. App. 3 ("Petitioners have no objection to the Court treating the [Petitioners'] Memorandum in Opposition as a Cross-Motion for Summary Judgment, if it agrees that no material facts are in dispute.") Neither the trial court nor the Vermont Supreme Court relied on facts in dispute.[3]

A final error in the petition is the claim that taxpayers like the petitioners are liable for interest and penalties on late payments up to 25 percent of the tax. Petition at 20 n.10. The 25 percent penalty was enacted as part of a law that taxes car rental companies. It does not apply at all to individuals. *See* P.A. No. 251 (1983 Vt., Adj. Sess.) Opp. App. 6-11 ("An Act Relating to the Motor Vehicle Purchase and Use Tax on Pleasure Car Rentals").

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[2] *Williams II* also overruled the inconsistent part of *American Trucking Ass'ns v. Conway*, 146 Vt. 579, 508 A.2d 408 (1986), a case cited by Petitioners as an example of Vermont intransigence.

[3] The statements contained in the press clippings appended to the Petition were not among the agreed facts. Pet. App. 32a-34a.

And, as petitioners' attorney well knows, the 1 percent penalty on late payments by individuals is not enforced. *See Williams v. Vermont*, 472 U.S. at 36 ("Mr. Williams and Ms. Levine apparently delayed the day on which they were required to pay for their right to use Vermont's roads by failing to register their cars within the time period set by Vermont law."). Neither Mr. Williams or Ms. Levine paid any penalties.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

STATE OF VERMONT

WILLIAM H. SORRELL
Attorney General

WILLIAM GRIFFIN
Chief Assistant Attorney General

THOMAS R. VIALL
Assistant Attorney General

NO. 223. AN ACT RELATING TO MOTOR VEHICLE PURCHASE AND USE TAX CREDIT FOR TAX PAID TO OTHER STATES.

(S.371)

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. 32 V.S.A. § 8911(9) is amended to read:

(9) "[pleasure cars acquired outside the state by a resident of Vermont]" *motor vehicles* on which a state sales or use tax has been paid by the person applying for a registration in Vermont "[, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances]". If the tax paid in another state is less than the Vermont tax the tax due shall be the difference;

Sec. 2. REPEAL

32 V.S.A. § 8911(11) is repealed.

* * *

See Pet's App. for Sections 3, 4 and 5.

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February 23, 1995

Ms. Diane A. Lavallee
Clerk
Chittenden Superior Court
P. O. Box 187
Burlington, VT 05402

Re: Williams v. Vermont – Docket No. S1247-93 CnC
Christensen v. McDonald – Docket No. S0117-94 CnC

Dear Diane:

I enclose two copies of Petitioners' Memorandum In Opposition To Summary Judgment in the above cases (one for each case file). Petitioners have no objection to the Court treating the Memorandum In Opposition as a Cross-Motion for Summary Judgment, if it agrees that no material facts are in dispute. *See* V.R.Civ.P. 56(c) ("summary judgment, when appropriate, may be rendered against the moving party"). However, Petitioners would respectfully request a conference with the Court if it does intend to issue a decision on the merits, in order to discuss notice to class members. Such notice was not given initially, while the parties discussed a possible settlement.

Thank you very much for your consideration.

Very truly yours,

GRAVEL AND SHEA

/s/ Norman C. Williams
Norman C. Williams

NCW:wnb

Enclosures

cc: William E. Griffin, Esq. (w/enclosures)
Thomas R. Viall, Esq. (w/enclosures)

STATE OF VERMONT
AGENCY OF TRANSPORTATION
DEPARTMENT OF MOTOR VEHICLES
120 State Street, Montpelier, Vermont 05603-0001

STATE OF VERMONT
DEPARTMENT OF MOTOR VEHICLES

IN RE:	)
	)
PETITIONS OF NORMAN WILLIAMS, SUSAN LEVINE AND JAMES WOODARD	)
	)
	)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Appearances:

Petitioners Norman Williams and Susan Levine were represented by Norman Williams Esquire and Jerome F. O'Neill of O'Neill and Crawford. Petitioner James Woodard was represented by Mary Kehoe, Esquire of Saxer, Anderson, Wolinsky and Sunshine. Thomas R. Viall, Esquire, Assistant Attorney General represented the Respondent State of Vermont Agency of Transportation Department of Motor Vehicles.

Decision Regarding Petition of James Woodard:

No pre-hearing pleadings were filed on behalf of James Woodard, and Mr. Woodard did not appear at the Final Hearing in these proceedings. Therefore, the Petition of James Woodard is dismissed.

Procedural Facts:

These Petitions are filed in accordance with the provisions of Title 23 V.S.A. §105, the undersigned Hearing Officer having been appointed to conduct these proceedings by Michael D. Griffes, Commissioner of the Motor Vehicle Department of the Vermont Agency of Transportation. The Petitioners seek refunds of motor vehicle Purchase and Use Taxes paid in accordance with Title 32 V.S.A. §8903. Title 32 V.S.A. §8914 provides for the refunding of taxes determined by the Commissioner to have been over payments.

* * *

not Vermont residents at the time they purchased motor vehicles out of state and who subsequently moved to Vermont. Nevertheless, Petitioners have failed to prove that either of them were members of this class of persons. Indeed, the record reflects that neither Petitioner consulted a Motor Vehicle Department Inspector at any time. The State has proven that applicants who were dealt with by other units of the Department were not denied equal protection of the laws. Although there is no specific evidence as to the relative numbers of the larger class of persons whose applications were resolved without any contact with the Inspectors and the smaller class of persons who did appeal to the Inspectors, I must conclude that the former class vastly out numbers the latter. Further, I find no case law authority for the proposition that the entire Department should be guilty of the sins of the Inspectors so that the Petitioners should be entitled to relief. Given the fact that each of the Petitioners dealt with units of the Department in which the law was

administered without any violations of equal protection as applied, I find that the Petitioners are not entitled to refunds of their motor vehicle Purchase and Use Taxes.

Having decided the merits of the Petitions favorably to the Department, I will not consider the question of the statute of limitations, noting that our Supreme Court has also remained silent on this question, *Williams v. State* 156 VT 42, 53 footnote 10.

Order:

The Petitions of Norman Williams and Susan Levine are each denied.

DATED at Jeffersonville, Vermont this 20th day of July, 1993.

/s/ Philip J. Fitzpatrick
Philip J. Fitzpatrick, Esquire
Hearing Officer

PUBLIC ACTS, 1984 SESSION

NO. 251. AN ACT RELATING TO THE MOTOR VEHICLE PURCHASE AND USE TAX ON PLEASURE CAR RENTALS.

(H.726)

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. 32 V.S.A. § 8902(9) is added to read:

(9) "Rental of pleasure cars on a short-term basis", or words of similar import, means rentals of pleasure cars for a rental period of less than one year. It shall not apply to school buses.

Sec. 2. 32 V.S.A. § 8903(a) is amended to read:

(a) There is hereby imposed upon the purchase in Vermont of a motor vehicle by a resident a tax at the time of such purchase, payable as hereinafter provided. The amount of the tax shall be four percent of the taxable cost of the motor vehicle or $600.00 for each motor vehicle, whichever is smaller, except that pleasure cars which are purchased for use in short-term rentals shall be subject to taxation under subsection (d) of this section.

Sec. 3. 32 V.S.A. § 8903(d) is added to read:

(d) There is hereby imposed a use tax on the rental charge of each transaction, in which the renter takes possession of the vehicle in this state, during the life of a pleasure car purchased for use in short-time rentals, which tax is to be collected by the rental company from the renter and remitted to the commissioner. The amount of the tax shall be five percent of the rental charge. Rental

charge means the total rental charge for the use of the pleasure car, but does not include a separately stated charge for insurance, or recovery of refueling costs, or other separately stated charges which are not for the use of the pleasure car. In the event of resale of the vehicle in this state for use other than short-term rental, such transaction shall be subject to the tax imposed by section 8903(a).

Sec. 4. 32 V.S.A. § 8905(d) is added to read:

(d) Every person required to collect the use tax under section 8903(d) shall forward such tax and a report of same on forms prescribed and furnished by the commissioner at the frequency determined by the commissioner.

Sec. 5. 32 V.S.A. § 8906 is amended to read:

§ 8906. TAX FORM CONTENTS

Except as otherwise provided pursuant to section 8905(d), such tax form shall require information as to the purchase price of the motor vehicle, the value of any motor vehicle accepted in trade together with its make, type, serial or identification number and year of manufacture and the make, type, serial or identification number and year of manufacture of the motor vehicle purchased.

Sec. 6. 32 V.S.A. § 8909 is amended to read:

§ 8909. ENFORCEMENT

If the tax due under subsections (a), (b) and (d) of section 8903 of this title is not paid as hereinbefore provided the commissioner shall suspend such purchaser's

or rental company's right to operate a motor vehicle within the state of Vermont until such tax is paid, and such tax may be recovered with costs in an action brought in the name of the state on this statute.

Sec. 7. 32 V.S.A. § 8913 is amended to read:

§ 8913. FRAUDULENT COLLECTION OF TAX

No person except the commissioner and his authorized representatives, including rental companies as provided in section 8903(d), may collect or accept payment of any tax imposed by this chapter. Any person so doing shall be presumed to have the intent to convert it to his own use. Any unauthorized person who wilfully collects or accepts payment of such a tax, upon conviction for a first offense, shall be fined not more than $200.00 or imprisoned for not more than ninety days, or both. Upon each subsequent conviction he shall be fined not more than $500.00 or imprisoned for not more than one year, or both.

Sec. 8. 32 V.S.A. § 8903(e) is added to read:

(e) Any person registering a pleasure car in this state subject to the tax imposed by subsection (d) which is not actually rented for not less than 30 days in any single year must pay the tax imposed by subsection (a) or (b) upon demand of the commissioner.

Sec. 9. 32 V.S.A. § 8902(10) is added to read:

(10) "Rental company" means any person offering pleasure cars for rent on a short-term basis.

Sec. 10. 32 V.S.A. § 8916 is added to read:

§ 8916. BONDS

(a) When the commissioner deems it necessary to protect the revenues to be obtained under this chapter, he may require a rental company to file with him a bond issued by a surety company authorized to transact business in this state and approved by the commissioner of banking and insurance of this state as to solvency and responsibility, in an amount fixed by the commissioner, but not to exceed the total potential liability of such person, to secure the payment of any tax or penalties or interest due or which may become due from a rental company under this chapter. In the event that the commissioner determines that such person is to file a bond, he shall give notice to him to that effect, specifying the amount of the bond required. That person shall file a bond within 15 days after the giving of the notice unless within those 15 days he shall request in writing a hearing before the commissioner at which the necessity, propriety and amount of the bond shall be determined by the commissioner. The determination shall be final and shall be complied with within 15 days after the giving of notice thereof. In lieu of a bond, securities approved by the commissioner or cash in such amount as he may prescribe may be deposited, which shall be kept in the custody of the state treasurer who may at any time upon instructions from the commissioner without notice to the depositor apply them to any tax or interest or penalties due, and for that purpose the securities may be sold by him at public or private sale without notice to the depositor thereof.

(b) The total amount of the bond required of a rental company may be fixed by the commissioner and

may be increased or decreased by him at any time subject to the limitations imposed by this section.

(c) If the liability upon a bond filed by a rental company with the commissioner becomes discharged or reduced, whether by judgment rendered, payment made or otherwise, or if in the opinion of the commissioner any surety on a bond has become unsatisfactory or unacceptable, the commissioner shall require the rental company to file a new bond with satisfactory sureties in the same amount and, upon failure to do so, the commissioner shall forthwith suspend the right to operate a motor vehicle in this state.

(d) If a rental company fails or refuses to increase the amount of a bond or file a bond as required by the commissioner within 15 days after notice mailed to him, his right to operate a motor vehicle in this state shall be suspended forthwith.

Sec. 11. 32 V.S.A. § 8917 is added to read:

§ 8917. BONDS; DISCHARGE

Any surety on a bond furnished by a rental company shall be discharged from any liability to the state accruing on the bond after expiration of 60 days from the date the surety shall have filed with the commissioner a written request to be released and discharged, but the surety shall not be released or discharged from liability already accrued or which shall accrue before the expiration of the 60-day period. The commissioner, upon receipt of such a request, shall promptly notify by mail the rental company who furnished the bond. Unless the rental company, prior to the expiration of the 60-day period, files a new bond

satisfactory to the commissioner, the commissioner shall suspend his right to operate a motor vehicle in this state.

Sec. 12. 32 V.S.A. § 8918 is added to read:

§ 8918. RECORDS

(a) Each rental company shall keep and retain for a period of not less than three years such records as may be prescribed by the commissioner which are reasonably necessary to substantiate the reports required by section 8905(d).

(b) The commissioner or his agents may examine the books and records of any rental company during the usual business hours of the day to verify the truth and accuracy of any statement, report or return or to determine if the tax imposed by this chapter has been paid.

Sec. 13. 32 V.S.A. § 8919 is added to read:

§ 8919. ADDITIONAL ASSESSMENTS

(a) If the commissioner is not satisfied that the report filed or the amount of tax paid by a rental company is accurate, after investigating and finding such inaccuracy, he may make an additional assessment of taxes due from such rental company based upon his investigation. A penalty equal to ten percent and interest at the rate of one and one-half percent per month shall be payable on the additional assessment, with interest computed from the date the tax payment was due. The commissioner shall give notice by mail to the rental company of the additional assessment, penalty and interest and shall designate the error or reason for such assessment. Payment shall be due within 30 days of the date of mailing the notice.

(b) When no report or payment of tax has been made as required by section 8905(d), or when a wilfully false or fraudulent report has been filed, the tax may be assessed at any time; in all other cases, no assessment of additional tax, and the mailing of notice thereof, shall be made after the expiration of three years from the date of filing a report.

Sec. 14. 32 V.S.A. § 8920 is added to read:

§ 8920. INTEREST; PENALTIES

(a) Any person who fails to file a report when due shall pay a fee of $10.00 as partial compensation for the added administrative costs.

(b) In addition to the fee prescribed in subsection (a), any person who fails to pay any tax when due, shall pay in addition to the tax interest calculated at one and one-half percent per month on the tax from the due date, until paid. In addition, if the taxpayer fails to pay the tax liability in full within 30 days, a penalty equal to five percent of the outstanding tax liability for each month or portion thereof, shall be paid; provided, however, that in no event shall the amount of the penalty imposed hereunder exceed 25 percent of the tax liability unpaid on the prescribed date of payment. The commissioner may remit all or any part of the penalty if he is satisfied that the delay was excusable.

Sec. 15. 32 V.S.A. § 8921 is added to read:

§ 8921. ASSESSMENTS

If a rental company neglects or refuses to file any report required by this chapter, the commissioner shall make an estimate of the tax due, based upon information available to him, for the period for which the rental company failed to make the report, and shall assess the tax due from such rental company, adding to the amount thus determined a penalty of 50 percent thereof. The assessment shall bear interest at the rate of one and one-half percent per month from the date the tax payment was due until paid. The commissioner shall give the rental company notice by mail of the assessment and payment shall be due within 15 days of the date of the mailing of the notice.

Sec. 16. 32 V.S.A. § 8922 is added to read:

§ 8922. ASSESSMENT; HEARING

A rental company against whom assessment is made pursuant to section 8919 or 8902 may appear in person or by counsel in the office of the commissioner within 15 days after the mailing to him of notice of the assessment then and there to show cause why the assessment is in error or to present any other facts or testimony that would bear on the amount of the assessment or the manner in which it was made. The hearing may be continued from time to time. If the rental company or his agent does not appear within the 15 days, the assessment shall become final.

Sec. 17. 32 V.S.A. § 8923 is added to read:

§ 8923. LICENSE REQUIRED

(a) It is unlawful for any person to act as a rental company without being licensed as such.

(b) On or before January 1 of each year, an applicant for a rental company license shall file with the commissioner an application prepared and furnished by the commissioner. The application shall not be under oath but shall contain a declaration that it is made under the penalties of perjury.

(c) Upon receipt of an application in proper form and the other conditions and requirements of this chapter having been complied with the commissioner may issue a license to an applicant which will remain in effect for one year or until such time as surrendered or revoked.

Sec. 18. TRANSITIONAL PROVISIONS

All rental companies shall apply for their first rental company license during the month of December 1984. Thereafter licenses shall be obtained pursuant to the provisions of section 8923(b).

Sec. 19. EFFECTIVE DATE

This act shall take effect January 1, 1985 except for Sec. 18 which shall take effect December 1, 1984.

Approved: May 16, 1984